Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

*

October Term, 1980

No. 80-835

DASCO, INC., DUDLEY A. SMITH, ROBERT J. CHAPMAN and SHERRIEL SMITH,

Petitioners,

vs.

AMERICAN CITY BANK AND TRUST COMPANY N.A., and FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY G. GREEN
Attorney for Petitioners
601 East Bridger Avenue
Las Vegas, Nevada 89101

QUESTION PRESENTED

Was it reversible error for the trial court to exclude the testimony of Petitioners' expert witness regarding the reasonable probability of a zoning change where the value of the subject property was at issue?

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In The

SUPREME COURT OF THE UNITED STATES

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October Term, 1980

No.

DASCO, INC., DUDLEY A. SMITH, ROBERT J. CHAPMAN and SHERRIEL SMITH,

Petitioners,

vs.

AMERICAN CITY BANK AND TRUST COMPANY N.A., and FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioners request that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, filed August 22, 1980.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law and the Judgment of the United States District Court for the District of Nevada, not yet

reported, appear as Appendix A to this Petition.

The Decision of the United States Court of Appeals for the Ninth Circuit, not yet reported, appears as Appendix B to this Petition.

JURISDICTION

The Decision of the United States Court of Appeals for the Ninth Circuit was filed on August 22, 1980.

This Petition for a writ of certiorari was served and filed within ninety (90) days of August 22, 1980.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Was it reversible error for the trial court to exclude the testimony of Petitioners' expert witness regarding the reasonable probability of a zoning change where the value of the subject property was at issue?

STATUTORY PROVISIONS INVOLVED

Nevada Revised Statutes § 40.457(1):

> "Before awarding a deficiency judgment [to a judgment creditor or a beneficiary to a deed of trust] under NRS 40.455, the court shall hold a hearing and shall take evidence presented by either party concerning the fair market value of the property sold as of the date of

foreclosure sale or trustee's sale. Notice of such hearing shall be served upon all defendants who have appeared in the action and against whom a deficiency judgment is sought, or upon their attorneys of record, at least 15 days before the date set for hearing."

Nevada Revised Statutes § 40.459:

"Limitations on amount of money judgment. After the hearing under NRS 40.457, the court may award a money judgment against the defendant or defendants personally liable for the debt. The court shall not render judgment for more than the amount by which the amount of indebtedness which was secured by the mortgage, deed of trust, or other lien at the time of the foreclosure sale or trustee's sale, as the case may be, exceeded the fair market value of the property sold at the time of such sale, with interest from the date of such sale. In no event shall the court award such judgment, exclusive of interest, after the date of such sale, in an amount exceeding the difference between the amount for which the property was actually sold at the foreclosure sale or trustee's sale and the amount of indebtedness which was secured by the mortgage, deed of trust or other lien at the time of such sale."

STATEMENT OF THE CASE

Respondent, DASCO, INC., Plaintiff/Appellant below, is a corporation engaged in the building and construction industry in Nevada. Petitioner, DUDLEY A. SMITH, is the president of DASCO, INC.

Respondent is the FEDERAL DEPOSIT INSURANCE CORPORATION (FDIC). FDIC's predecessor in interest was the AMERICAN CITY BANK AND TRUST COMPANY of Milwaukee, Wisconsin (hereinafter "Bank".)

Prior to June, 1974, Tom Joswick and Rudy Braun purchased forty-one acres of unimproved real property fronting on a major thoroughfare in Las Vegas, Nevada. The purchase of the property was financed through the Bank, which loaned Joswick and Braun a principal amount of approximately $1,300,000.00 with a total commitment of approximately $1,450,000.00. Joswick and Braun subsequently defaulted on the loan. Because the Bank was under an obligation to use its best efforts to find a construction loan for the property and because the financial strength of Joswick and Braun was dubious, the bank took a deed on the property in lieu of foreclosure.

In September, 1974, representatives of the Bank approached Petitioners DUDLEY A. SMITH and ROBERT J. CHAPMAN, officers of Petitioner DASCO, regarding the possibility of DASCO substituting its position for that of Joswick and Braun with respect to developing the property which the Bank was carrying on its books as an asset. As a result of negotiations, the Bank deeded the property to DASCO on November 5, 1974. In return, DASCO assumed the loan of the property in the sum $1,450,000.00. In addition, DUDLEY A. SMITH and SHERRIEL SMITH executed a limited personal guaran-

tee in the sum of $100,000.00. It was also agreed that the Bank would fund the balance of the interest built into the loan for a period of one year in order to give DASCO time to develop the property.

Thereafter, DASCO informed the Bank that it could not develop the property within the year because of unfavorable economic conditions. The Bank thereupon elected to take back the deed in lieu of foreclosure, thereby cancelling the deed, note, deed of trust and guarantees. The Bank preferred, however, that the property remain in DASCO's name until it could be developed.

The Bank became insolvent in 1975. The Bank's successor in interest, FDIC, refused to accept the deed tendered by DASCO and demanded full payment on the note, together with interest in the total sum of $1,679,496.67. In March, 1977, the property was sold at a trustee's sale for $1,200,000.00.

In March, 1976, prior to the Trustee's sale, DASCO and DUDLEY A. SMITH filed a complaint for specific performance in the Eighth Judicial District Court of the State of Nevada seeking an order compelling FDIC to accept DASCO's tender of the deed and declaring that no sums were due and owing FDIC from DASCO and SMITH.

The action was removed to the United States District Court for the District of Nevada upon FDIC's petition, pursuant to 28 U.S.C. § 1441(a) and 12 U.S.C. § 1819. Thereafter, FDIC filed an answer denying the allegations in Petitioners' complaint and counterclaimed against DASCO, DUDLEY A. SMITH, SHERRIEL SMITH, and ROBERT J. CHAPMAN seeking a deficiency judgment on the note and personal guarantees for the difference between the

note and the fair market value of the property on the date of the trustee's sale. Judgment was ultimately granted by the District Court in favor of FDIC, both on the complaint and the counterclaim. DASCO was held liable to FDIC for the sum $295,709.13, plus interest, said sum representing the difference between the amount of the note and the property's fair market value as determined at trial. DUDLEY A. SMITH and SHERRIEL SMITH were held liable to FDIC on their personal guarantees to the extent of $100,000.00 of the principal judgment against DASCO.

During the course of the trial, Petitioners introduced the testimony of expert witnesses as to the fair market value of the property for the purpose of establishing that the property's value exceeded the amount obtained at the trustee's sale, a finding which would have reduced Petitioners' liability. The first witness was Everett J. Downey, Director of Planning in Clark County from 1970 to 1978. Mr. Downey testified as to his qualifications, his personal knowledge of the subject property, and the manner in which the property was actually zoned on the date of the trustee's sale. He further testified that, in March, 1977, an application was submitted and a resolution of intent issued to change the zoning for the entire fifteen-acre portion of the property fronting on Tropicana Avenue, a major east-west corridor in Las Vegas, from R3 to R4, a higher-density multiple use. However, when Petitioners' counsel asked Mr. Downey the probability that the rezoning from R3 to R4 would actually be passed, Respondents' counsel objected on the grounds that the question called for a speculative answer. Over the protest of Petitioners' counsel, the court sustained the objection. The court also sustained Respondent's objection when Petitioners' counsel asked Mr.

Downey the probability of a purchaser of the property obtaining commercial zoning on the entire fifteen-acre portion fronting on Tropicana Avenue, a change which would have increased the intrinsic value of the property. Petitioners' contend that this exclusion constituted reversible error.

It is to be noted that Petitioners' other expert witnesses--including professional real-estate appraisers and major land developers and contractors--all introduced evidence that the value of the property exceeded, albeit by varying amounts, the price obtained at the trustee's sale, despite the exclusion of evidence relative to the potential for more profitable rezoning. Relying entirely on the testimony of FDIC's expert witness, the trial court held that the property had a fair market value of $1,375,000.00, setting Petitioners' liability as the difference between that sum and the amount of the loan.

With regard to the question of the excluded evidence, the Court of Appeals stated:

> "While the evidence of the probability of a zone change might have been probative and admissible, it does not follow that its exclusion was reversible error. In light of the number of witnesses who testified on the subject, the judge had all the help he needed."

REASONS FOR GRANTING THE WRIT

Rule 19 of the Supreme Court Rules states that the Court may grant review on writ of certiorari where a Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a

lower court, as to call for an exercise of this court's power of supervision." This case presents such an instance.

As the Court of Appeals recognized, evidence of the probability of a zone change is relevant and admissible on the issue of the fair market value of real property. The most common application of this rule is found in cases involving eminent domain and condemnation.

> "The courts have had little difficulty in reaching what seems to us to be a proper result in cases involving zoning ordinances. It is generally held that although an ordinance may prohibit the use of a property for certain purposes at the time of condemnation, yet if there is a reasonable probability that the ordinance may be changed or an exception made, the value for that purpose as affected by the existing ordinance may be considered."

Orgel, Evaluation Under Eminent Domain § 34, at 167 (1953).

> "It is by now well established that if the proof offered on behalf of the claimant to the award of compensation shows a reasonable probability that, had the taking in eminent domain not taken place, the zoning would have been changed, either by amendment to the ordinance by the legislative body or by the court finding, in an action to declare the existing zoning confis-

> catory, that the existing zoning is too restrictive (thus permitting a use more advantageous than those permitted at the time of the taking), such probability should be considered in the ascertainment of value."

Rathkopf, 3 The Law Of Zoning and Planning, ch 51, at 2-3 (4th ed. 1966).

The general rule is well-supported by case law. In People v. Arthofer, 245 Cal. App. 2d 454, 54 Cal. Rptr. 878 (Ct. App. 1966), although the court affirmed the trial court's exclusion of a land-owner's planning expert because he possessed information only as to the mere possibility rather than probability of a zone change, the decision contains a lucid exposition of the general rule that evidence of the probability of a zone change is admissible.

> "Where there is a reasonable probability that zoning restrictions will be altered in the near future, the jury should be permitted to consider not only those uses currently permitted, but also other uses to which the property could be devoted in the event of such change. . . . The jury is entitled to consider those factors which a buyer would take into consideration in arriving at fair market value in the event said buyer contemplated a purchase of the property. . . . Plausible and probable changes in the character of the neighborhood and in the zoning

> restrictions in an area constitute factors which a buyer would consider in arriving at an opinion as to fair market value. . . .
>
> " . . .
>
> " . . . [W]here the property sought to be condemned is not presently available for a particular use by reason of a zoning ordinance or other restriction imposed by law, but the evidence tends to show a 'reasonable probability' of a change in the near future, the effect of such probability on the minds of purchasers generally may be taken into consideration in fixing present market value."

54 Cal. Rptr. at 883-84

Other decisions upholding the general rule include the following: In re Incorporated Village of Garden City, 9 Misc. 2d 693, 167 N.Y.S.2d 166 (Sup. Ct. 1956), aff'd, 4 A.D.2d 783, 165 N.Y.S.2d 1022 (App. Div. 1957); School District No. 13 of Huntington v. Wicks, 227 N.Y.S.2d 768 (Sup. Ct. 1962); Cook v. Pieper, 34 Misc. 2d 532, 228 N.Y.S.2d 601 (Sup. Ct. 1962); Papovitch v. State, 235 N.Y.S.2d 97, 37 Misc. 2d 994 (Ct. Cl. 1962); In re Board of Education, Union Free School Dist. No. 22, 216 N.Y.S.2d 811 (Sup. Ct. 1961), aff'd, 242 N.Y.S.2d 623 (App. Div. 1963); Albany Country Club v. State, 37 Misc. 2d 134, 235 N.Y.S.2d 684 (Ct. Cl. 1962), aff'd, 13 N.Y.2d 1085, 246 N.Y.S.2d 407, 196 N.E.2d 62 (1962); State Highway Comm'r v. Gorga, 26 N.J. 113, 138 A.2d 833 (1957); Swift & Co. v. Housing Auth. of Plant City, 106 So.2d 616 (Fla. 1958); Board of Comm'rs of State

Institutions v. Tallahassee Bank & Trust Co., 108 So.2d 74 (Fla. Dist. Ct. App. 1958), aff'd, 116 So.2d 762 (Fla. 1959); State v. Pahl, 254 Minn. 349, 95 N.W.2d 85 (1959); Bowling Green-Warren County Airport Bd. v. Long, 364 S.W.2d 167 (Ky. Ct. App. 1963); Austin v. Cannizzo, 153 Tex. 324, 267 S.W.2d 808 (1954); City of Beverly Hills v. Anger, 217 Cal. App. 223, 15 P.2d 867 (Dist. Ct. App. 1932); State Roads Comm'r of Maryland v. Warriner, 211 Md. 480, 128 A.2d 248 (Ct. App. 1957); Lustine v. State Roads Commissioner, 217 Md. 274, 142 A.2d 566 (Ct. App. 1958); Bergemen v. State Roads Comm'n of Maryland, 218 Md. 137, 146 A.2d 48 (Md. Ct. App. 1958); Sayers v. City of Mobile, 276 Ala. 589, 165 So.2d 371 (1964); Snyder v. Commonwealth, 412 Pa. 15, 192 A.2d 650 (1963); Andrews v. Dallas, 232 S.W.2d 753 (Tex. Civ. App. 1950); People v. Dunn, 46 Cal. 2d 639, 297 P.2d 964 (1956); Hall v. City of West Des Moines, 245 Iowa 458, 62 N.W.2d 734 (1954); State v. Williams, 289 S.W.2d 64 (Mo. 1956); City of Tyler v. Ginn, 225 S.W.2d 997 (Tex. Civ. App. 1949).

The exclusion of relevant, admissible evidence constitutes reversible error where the exclusion affects a substantial right of a party. Fed. R. Evid. 103 (a); Fed. R. Civ. P. 61.

In the instant case, the exclusion of evidence of a probable zoning change resulted in a valuation of the property artificially lowered by a substantial amount, significantly increasing Petitioners' liability. If such evidence had been admitted, it is not inconceivable Petitioners' liability could have been completely eliminated; and, thus, the exclusion of such evidence plainly affected a substantial right of Petitioners. That the exclusion of evidence of the reasonable probability of a zoning change constitutes reversible

error was recognized in Andrews v. City of Dallas, 232 S.W.2d 753 (Tex. Civ. App. 1950). In that decision, the decision of the trial court was reversed because of instructions to the jury that it could only consider the value of condemned property for residence purposes since its use for business purposes had been prohibited by a city zoning ordinance. The court stated:

> "Where a city has zoned the property being condemned by it for residence use, it is error to exclude evidence of market value for residence purposes; it is also error to exclude its market value for any other purpose for which it is adaptable; and it matters not that the land may be presently unavailable under the zoning ordinance for all such purposes."

232 S.W.2d at 755.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit, and that that court's decision be reversed and the case remanded for a new trial at which valuation evidence previously excluded may be admitted.

Respectfully submitted,

JEFFREY G. GREEN
Attorney for Petitioners
601 East Bridger Avenue
Las Vegas, Nevada 89101

APPENDIX A - JUDGMENT, FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA FILED MARCH 31, 1978

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

No. CV-LV-76-113, RDF

Filed March 31, 1978

By Carol C. Fitzgerald
Clerk

DASCO, INC., a Nevada corporation, and DUDLEY A. SMITH,

Plaintiffs,

vs.

AMERICAN CITY BANK AND TRUST COMPANY N.A., a national banking association, FEDERAL DEPOSIT INSURANCE CORPORATION, RAYMOND CALLEN, JAMES W. SULLIVAN, and JOHN DOES I through V, inclusive,

Defendants.

ROBERT J. CHAPMAN and SHERRIEL SMITH,

Additional Defendants
on Counterclaim

This action came on for trial before the Court on March 27th and 28th, 1978, the Honorable Manuel Real, District Judge, presiding and the issues having been duly tried and the Court having entered its Findings of Fact and Conclusions of

law,

IT IS ORDERED AND ADJUDGED that the Defendant and Counterclaimant, FEDERAL DEPOSIT INSURANCE CORPORATION, is awarded the sum of $295,709.13 together with interest thereon at the rate of ten percent (10%) per annum from March 12, 1977 to date of Judgment of $30,947.91, together with Trustee Fees of $8,787.54, its costs of action of $857.36 and attorneys' fee of $7,887.50, and

IT IS ORDERED AND ADJUDGED that the Defendant and Counterclaimant, FEDERAL DEPOSIT INSURANCE CORPORATION recover of the Counterdefendants, DUDLEY A. SMITH and SHERRIEL SMITH on their personal guarantees to the extent of $100,000.00 of said principal Judgment against DASCO, INC.

DATED this 28 day of March, 1978, at Las Vegas, Nevada.

s/ Manuel Real
UNITED STATES DISTRICT JUDGE

APPENDIX A - JUDGMENT, FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA FILED MARCH 31, 1978

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

No. CV-LV-76-113, RDF

Filed March 31, 1978

By Carol C. Fitzgerald
Clerk

DASCO, INC., a Nevada corporation, and DUDLEY A. SMITH,

Plaintiffs,

vs.

AMERICAN CITY BANK AND TRUST COMPANY N.A., a national banking association, FEDERAL DEPOSIT INSURANCE CORPORATION, RAYMOND CALLEN, JAMES W. SULLIVAN, and JOHN DOES I through V, inclusive,

Defendants.

ROBERT J. CHAPMAN and SHERRIEL SMITH,

Additional Defendants
on Counterclaim

This matter coming on for trial on March 27th and 28th, 1978, between the Plaintiffs, and Counterdefendants, represented by Jeffrey G. Green, Esq. and Michael Leavitt, Esq., of the law firm of Bell, Leavitt & Green, Chartered, and the

Defendant FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of AMERICAN CITY BANK AND TRUST COMPANY, N.A., and the FEDERAL DEPOSIT INSURANCE CORPORATION in its corporate capacity, represented by Clark J. Guild, Jr., Esq. and Thomas J. Hall, Esq., of the law firm of Guild, Hagen & Clark, Ltd., and the Court having heard the evidence and testimony presented by the parties, and having considered the written briefs of the parties, and their oral arguments, now makes its following Findings of Fact and Conclusions of law:

FINDINGS OF FACT

1. On November 5, 1974, AMERICAN CITY BANK AND TRUST COMPANY, N.A., entered into a Loan Agreement with DASCO, INC. for the sale and purchase of a 40 acre tract of land situate in Clark County, State of Nevada, more particularly described therein.

2. In connection with said Loan Agreement, DASCO, INC., a Nevada corporation, executed its Promissory Note secured by a Deed of Trust dated November 5, 1974 in the principal sum of $1,450,000.00 or so much thereof as from time to time was disbursed to or for the benefit of Counterdefendant DASCO, INC. with interest on each advance thereof at a rate equal to ten percent (10%) per annum, all as is more particularly set forth in said Promissory Note.

3. As and for additional security the Counterdefendants DUDLEY A. SMITH and SHERRIEL SMITH, his wife, executed a Limited Guarantee of Note and Mortgage dated November 5, 1974 in the principal amount of $100,000.00 guaranteeing the obligations of DASCO, INC. to AMERICAN CITY BANK

AND TRUST COMPANY, N.A.

4. In consideration of said Note and Guarantee, the AMERICAN CITY BANK AND TRUST COMPANY, N.A., sold and conveyed to the Plaintiff DASCO, INC. by Deed the subject property on November 5, 1974.

5. That the FEDERAL DEPOSIT INSURANCE CORPORATION was appointed Receiver for AMERICAN CITY BANK AND TRUST COMPANY, N.A., on October 21, 1976.

6. That the FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver sold pursuant to a Purchase and Assumption Agreement the hereinabove described obligation of the Plaintiffs to the FEDERAL DEPOSIT INSURANCE CORPORATION in its corporate capacity.

7. On or before March 11, 1977, said Promissory Note became in default and demand for payment was made upon the Counterdefendants DASCO, INC., DUDLEY A. SMITH, ROBERT J. CHAPMAN and SHERRIEL SMITH.

8. On March 11, 1977, after due and proper notice the subject real property which was mortgaged to secure the indebtedness of the Plaintiffs was sold at a public Trustee's Sale for $1,200,000.00.

9. Its fair market value at that time was $1,375,000.00.

10. The Trustee's fees and commissions in connection with said sale amounted to $8,787.54.

11. Attorney fees in the amount of $7,887.50 were expended on behalf of the Federal Deposit Insurance Corporation together with costs of $857.36 or a total of $8,744.86.

12. The Defendant FEDERAL DEPOSIT INSURANCE CORPORATION is entitled to judgment against DASCO, INC., on the Promissory Note for the amount of funds advanced in said Note together with interest less all credits and proceeds received from the above mentioned Trustee's Sale, which yields the total amount owed, due and unpaid as follows:

Principal Balance - March 11, 1977		$1,428,651.70
Interest Due(10%) - March 11, 1977		242,057.48
Total Due:		$1,670.709.13
Fair Market Value	$1,375,000.00	
Interest Applied		$ 242,057.43
Principal Applied		1,132.942.57
Principal Balance - March 12, 1977		$ 295,709.13
Interest March 12, 1977 to March 28, 1978		$ 30,948.08
	TOTAL:	$ 326,658.21

13. The Counterclaimant FEDERAL DEPOSIT INSURANCE CORPORATION is entitled to an award of reasonable attorneys' fees of $7,887.50 together with costs of $857.36 or a total of $8,744.86.

14. Pursuant to their personal guarantee Counterdefendants DUDLEY A. SMITH and SHERRIEL SMITH, his wife, are liable to the Counterclaimant to the extent of $100,000.00.

15. There was no binding oral or collateral

agreement entered into by and between the parties at the time the Loan Agreement was made on November 5, 1974, such that the Counterdefendants could merely deed the subject property back to AMERICAN CITY BANK AND TRUST COMPANY, N.A., and all debts and liabilities would be extinguished thereunder.

16. From the foregoing Findings of Fact, the Court now declares the following Conclusions of Law:

CONCLUSIONS OF LAW

1. This Court has original jurisdiction of this cause pursuant to Title 12, United States Code, Section 1819.

2. The Loan Agreement, Promissory Note secured by Deed of Trust, Deed of Trust, Limited Guarantee of Note and Mortgage, and Individual Guarantees, all dated November 5, 1974, and identified as Exhibits "1" through "4" respectively, constitute the entire written agreement of the parties and are binding upon the parties, their successors and assigns.

3. That the FEDERAL DEPOSIT INSURANCE CORPORATION in its corporate capacity succeeded by Purchase and Assumption Agreement to the rights and obligations of the AMERICAN CITY BANK AND TRUST COMPANY, N.A., in the above mentioned documents.

4. Title 12, U.S.C. §1823(e) is applicable to the instant case.

5. Specific performance is not available

against the FEDERAL DEPOSIT INSURANCE CORPORATION as Bank Receiver.

6. The interest charged by the FEDERAL DEPOSIT INSURANCE CORPORATION of ten percent (10%) simple interest is a legal rate of interest and is not usurious.

7. The Trustee's Sale held March 11, 1977 was duly and regularly conducted after due and proper notice.

8. The fair market value of the property sold on March 11, 1977 by the Trustee was $1,375,000.00.

9. The Counterclaimant FEDERAL DEPOSIT INSURANCE CORPORATION is entitled to judgment pursuant to N.R.S. 40.451, et. seq. (Deficiency Judgment) in the principal sum of $295,709.13 together with interest thereon at the rate of ten percent (10%) per annum from March 12, 1977 to date of Judgment of $30,947.91 together with Trustee Fees of $8,787.54, its costs of action of $857.36 and attorneys' fee of $7,887.50.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED this 28 day of March, 1978.

s/Manuel Real
UNITED STATES DISTRICT JUDGE

APPENDIX B - DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AUGUST 22, 1980

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 78-2149

Filed August 22, 1980

By Richard H. Deane
Clerk, U.S. Court of Appeals

DASCO, INC., a Nevada corporation, and DUDLEY A. SMITH,

Appellants; Plaintiffs, and Counter-defendants below,

v.

AMERICAN CITY BANK AND TRUST COMPANY N.A., a national banking association, FEDERAL DEPOSIT INSURANCE CORPORATION, and JOHN DOES I through V, inclusive,

Respondents-Defendants below,

ROBERT J. CHAPMAN and SHERRIEL SMITH,

Additional Defendants on Counterclaim

Before: WRIGHT and ANDERSON, Circuit Judges, and BELLONI,* District Judge

*Honorable Robert C. Belloni, United States District Judge for the District of Oregon, sitting by designation.

Argued and Submitted: August 12, 1980

Dasco raises two issues: (1) the trial judge wrongly excluded evidence related to a possible zoning change and (2) he applied the wrong definition of fair market value. We affirm.

The court's findings of fact will not be set aside unless clearly erroneous. F.R.Civ. P. 52(1). The Finding of the value of the property is said to be clearly erroneous because the court failed to consider the possibility or probability that the property might be rezoned. While it is true that the possibility of rezoning might have influenced the price a willing buyer would have paid a willing seller, see United States v. 429.59 Acres of Land, 612 F.2d 459, 462 (9th Cir. 1980), it was merely one factor.

This court has long recognized that:

> A trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action must be sustained unless manifestly erroneous.

Williams v. Fenix & Scisson, Inc., 608 F.2d 1205, 1209 (9th Cir. 1979).

It was for the trial judge to determine whether the proferred evidence would have aided his determination of fair market value. The judge had before him several appraisals offered by witnesses for both sides.

While the evidence of the probability of a

zoning change might have been probative and admissible, it does not follow that its exclusion was reversible error. In light of the number of witnesses who testified on the subject, the judge had all the help he needed.

Dasco's contention that the judge employed a faulty definition of fair market value has no merit. This court recently set out the definition:

> Market value is the price which a reasonable seller who desires to sell but is not required to sell would demand for the property and the price which a reasonable buyer who desired to buy but was not required to buy would pay for the same, assuming a reasonable time for negotiations and explorations of alternatives.

United States v. 429.59 Acres of Land, supra, 612 F.2d at 462.

This is substantially the definition given by appellee's witness, Mr. Wallace, on cross-examination. The fact that Wallace referred to a cash price does not affect his definition. Dasco has cited no case which holds that the fair market value must be established other than on a cash sale basis. The proposition is without support in law or in logic.

The decision is AFFIRMED.

No. 80-835

In the Supreme Court of the United States

OCTOBER TERM, 1980

DASCO, INC., ET AL., PETITIONERS

v.

AMERICAN CITY BANK AND TRUST COMPANY, N.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

THOMAS S. MARTIN
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
HOWARD S. SCHER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether, under Nevada law, the district court erred in excluding evidence of the probability of a change in the zoning laws from its determination of the fair market value of real property for the purposes of Nevada deficiency judgment proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 9a-11a) is not reported. The opinion of the district court (Pet. App. 3a-8a) also is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1980. The petition for a writ of certiorari was filed on November 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 5, 1974, respondent American City Bank and Trust Company, N.A., deeded to petitioner Dasco, Inc., a 40-acre tract of unimproved land located in Las Vegas, Nevada. In exchange for the deed, Dasco executed its promissory note for $1,450,000 secured by a deed of trust dated November 5, 1974. In addition, Dasco's president and his wife, petitioners Dudley A. Smith and Sherriel Smith, executed a personal guarantee of the note and mortgage to the extent of $100,000 (Pet. 4-5; Pet. App. 4a-5a).

Thereafter, the bank became insolvent, and on October 21, 1976, respondent Federal Deposit Insurance Corporation was appointed the receiver for the bank. On or before March 11, 1977, the promissory note became in default and the FDIC made a demand for payment upon petitioners. The FDIC then gave proper notice and scheduled the property to be sold at a public trustee's sale (Pet. 5; Pet. App. 5a).

2. Before the sale could take place, however, petitioners filed the present suit in a Nevada state court, seeking specific performance in the form of an order to compel the FDIC to accept Dasco's tender of the deed to the property in full satisfaction of its promissory note. Upon the FDIC's petition pursuant to 28 U.S.C. 1441(a) and 12 U.S.C. 1819, the action was removed to the United States District Court

for the District of Nevada. The FDIC then counterclaimed, seeking a deficiency judgment on the promissory note and the personal guarantees for the difference between the note and the fair market value of the property on the date of the trustee's sale (Pet. 5-6).

On March 9, 1977, the district court denied petitioners' motion for a preliminary injunction, which permitted the trustee's sale to be carried out. *Dasco, Inc.* v. *American City Bank and Trust Co., N.A.*, 429 F. Supp. 767 (D. Nev.). On March 11, 1977, the property was sold for $1,200,000 (Pet. App. 5a).

On March 31, 1978, the district court found that the fair market value of the property on the date of the sale was $1,375,000, and awarded the FDIC a deficiency judgment in the amount of $295,709.13 plus interest. The Smiths were held liable to the extent of their $100,000 guarantee (Pet. App. 5a-6a).[1] In determining the fair market value of the property, the district court heard several appraisals of the property offered by witnesses for both sides (Pet. App. 10a). The court, however, excluded expert testimony offered by petitioners concerning the probability that a portion (15 acres) of the 40-acre tract would be rezoned and that such rezoning would enhance the fair market value of the property (Pet. 6-7).

The court of appeals affirmed, stating (Pet. App. 10a-11a) that "[w]hile the evidence of the probability of a zoning change might have been probative and admissible, it does

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[1]The district court also found (Pet. App. 6a-7a) that no binding oral or collateral agreement had been entered into on November 5, 1974, between petitioners and the bank to the effect that, upon default, petitioners could merely deed the property back to the bank in full satisfaction of their obligations. In view of this finding, the court held (Pet. App. 7a-8a) that specific performance was not available against the FDIC as the bank's receiver. Petitioners have not challenged that part of the district court's decision before this Court.

not follow that its exclusion was reversible error. In light of the number of witnesses who testified on the subject, the judge had all the help he needed."

ARGUMENT

Petitioners contend (Pet. 7-12) that the district court erred in excluding certain evidence from its consideration of the fair market value of the subject property. The decisions of the court of appeals and the district court, however, are plainly correct and do not conflict with any decision of this Court or any court of appeals. Further review of this question of state law thus is unwarranted.

Petitioners cite no Nevada law, but, instead, rely on a variety of sources that indicate nothing more than that, in determining the fair market value of real property *for eminent domain and condemnation* purposes, evidence of the probability of a zoning change *may* be considered. Nevada law—which, of course, is controlling—distinguishes, however, between the valuation of property for condemnation purposes and the valuation of property for purposes of deficiency judgment proceedings, as here (*Tahoe Highlander* v. *Westside Federal Savings & Loan Association*, 95 Nev. 8, 11, 588 P.2d 1022, 1024 (1979)):

> Although highest and best use may be determinative of value for purposes of condemnation, see *Sorenson* v. *State ex rel. Dep't of Hwys.*, 92 Nev. 445, 552 P.2d 487 (1976), it is but one factor to be considered in ascertaining the property's fair market value for purposes of deficiency judgment proceedings. See *Union Nat. Bank of Pittsburgh* v. *Crump*, 349 Pa. 339, 37 A.2d 733 (1944). Accordingly, the district court, in exercise of its discretion, could properly consider the experts' testimony relative to highest and best use, along with the rest of the evidence in the record, in determining the fair market value of the property.

> Where, as here, that determination is supported by substantial evidence, it will not be disturbed on appeal. *[Ibid.]*; see also Briggs v. *Zamalloa*, 83 Nev. 400, 432 P.2d 672 (1967).

Thus, since the "highest and best use" of property may be determinative of its valuation for condemnation purposes, whereas it is only one factor to be considered in ascertaining the property's fair market value in deficiency judgment proceedings, it follows that the authorities relied on by petitioner involving condemnation and eminent domain proceedings are inapposite to the instant claim for a deficiency judgment.

Moreover, because the "highest and best use" of the property was only one factor to be considered, and because the district court judge "had before him several appraisals offered by witnesses for both sides" (Pet. App. 10a), his exclusion of evidence concerning a possible zoning change and consequent increase in the value of the property did not constitute reversible error. As the court of appeals recognized (*ibid.*), "[i]t was for the trial judge to determine whether the proferred evidence would have aided his determination of fair market value."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

THOMAS S. MARTIN
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
HOWARD S. SCHER
Attorneys

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